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7. Judicial cross-referencing in the sentencing practice of international(ized) criminal courts and tribunals

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1. INTRODUCTION

The statutes of international(ized) criminal courts and tribunals have given judges a significant degree of discretion in determining the sentences to be imposed on individuals found guilty of the commission of international crimes.¹ Even the highly detailed ICCSt offers just ‘a few laconic provisions establishing the maximum available sentence and, by and large, leaving the determination in specific cases to the judges’.² Judges have been left to determine, inter alia, the specific goals and objectives to be achieved through the sentencing process, the principles that govern the determination of sentences by international(ized) courts and tribunals, the full range of factors that should be taken into account in the sentencing process and the weight to be given to them.

As judges have encountered these issues they have shown a tendency to refer not only to their own previous decisions, but also to the decisions of other international(ized) and domestic criminal courts and tribunals, and to do so with considerable frequency. The tendency of judges to refer to external jurisprudence on sentencing issues can be viewed as part of a broad, and growing, interaction between various international(ized), regional and domestic courts and tribunals, both within and beyond the field of international criminal law.³ This trend has been driven by a number of factors, including the movement of personnel between judicial institutions, new opportunities for judges and legal officers from different institutions to come into contact with one another and the increasing availability of external jurisprudence

* I am grateful to Mathilde Pavis for translation assistance in the preparation of this chapter.

¹ S. D’Ascoli, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Hart Publishing 2011) 1–2.

² W. Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 331.

³ On the practice of judicial cross-referencing between international courts and tribunals, see, for example, N. Miller, ‘An International Jurisprudence? The Operation of “Precedent” Across International Tribunals’ (2002) 15 LJIL 483, 488; C.P.R. Romano, ‘Deciphering the Grammar of the International Judicial Dialogue’ (2009) 41 *International Law and Politics* 755; A.Z. Borda, ‘Precedent in International Criminal Courts and Tribunals’ (2013) 2(2) *Cambridge Journal of International and Comparative Law* 287.

through easily accessible online databases.⁴ In the context of international sentencing the practice of judicial cross-referencing between international(ized) courts and tribunals is also supported by the existence of statutory provisions that require judges to 'have recourse to' the sentencing practice of other institutions.⁵ Such provisions provide not only a legal basis, but also an obligation for judges to engage in the practice of judicial cross-referencing in the course of their decision-making.

While the sentencing practice of international(ized) criminal courts and tribunals has triggered a significant amount of legal scholarship, little attention has been paid to the interaction between judicial institutions on sentencing issues. Furthermore, research into the nature and scope of interaction between various international and domestic courts and tribunals in the interpretation and application of international law has tended not to focus on the specific issue of when and how judges refer to the decisions of other judicial institutions in the course of their sentencing decisions, or the significance of the practice.

In light of the above, the purpose of this chapter is to provide an insight into the practice of judicial cross-referencing in the sentencing decisions of international criminal courts and tribunals and to consider its implications. It does so by surveying the sentencing decisions of three international(ized) criminal justice mechanisms: the SCSL, the ECCC, and the ICC.⁶ These institutions have been chosen as a point of focus for the study because they have all produced sentencing decisions against the backdrop of a large, and growing, body of international case law on sentencing issues, much of which has been produced by the two *ad hoc* Tribunals, the ICTY and ICTR. Consequently, the judges of all three institutions have had considerable scope to refer to the decisions of other courts and tribunals in the course of their reasoning. For the purposes of this chapter, content analysis of the sentencing decisions of the SCSL, the ECCC and the ICC has been used to highlight patterns and trends in the reference to, and use of, external jurisprudence in international sentencing decisions, and to consider its potential implications.

It is important to note that analysis of the sentencing decisions of the SCSL, the ECCC and the ICC cannot provide a comprehensive account of the use of external jurisprudence in the sentencing of individuals for the commission of international crimes. A key reason for this is that judicial decisions only reveal the aspects of the judicial decision-making process that have been committed to paper.⁷ They may not

⁴ For discussion of the causes of judicial interaction, see A-M. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 129–32. See also A-M. Slaughter, 'Judicial Globalisation' (1999–2000) 40 *Virginia Journal of International Law* 1103, 1111.

⁵ Art. 24(1) ICTYSt; Art. 23(1) ICTRSt; Art. 19(1) SCSLSt; Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, s. 10.1; Art. 24(1) STLSt.

⁶ Whereas the ICC is purely international in nature, the SCSL and the ECCC can be described as 'internationalized' or 'hybrid' criminal justice mechanisms on the basis that they combine both international and domestic elements in terms of applicable law and personnel. See L. Raub, 'Positioning Hybrid Tribunals in International Criminal Justice' (2009) 41 *New York University Journal of International Law and Politics* 1013, 1016.

⁷ For discussion of the limits of content analysis in this context, see Romano (n 3) 761–2.

record all instances of judicial cross-referencing that have taken place or give precise details about how external jurisprudence has been used in the course of the judicial decision-making process. Nonetheless, the analysis can offer a significant insight into the practice of judicial cross-referencing and is an important foundation for critical discussion.

The remainder of this chapter is divided into three sections. The first provides a brief overview of the methodology used for the study and the terminology that has been adopted. The second presents the results of the content analysis and highlights patterns and trends in the use of external jurisprudence that can be found in the sentencing decisions of the SCSL, the ECCC and the ICC. The final section assesses the implications of the practice of judicial cross-referencing in international sentencing decisions. The chapter concludes with a look to the future of judicial cross-referencing in the field of international sentencing and the role that the ICC may come to play as a source of jurisprudence on sentencing issues.

2. METHODOLOGY AND TERMINOLOGY

The content analysis referred to in the following section encompasses all of the sentencing decisions that have been rendered by the SCSL, the ECCC and the ICC up to the end of May 2014. This includes four decisions of the Trial Chambers of the SCSL,⁸ one decision of the Trial Chamber of the ECCC,⁹ and two decisions of the Trial Chambers of the ICC.¹⁰ It also includes relevant judgments of the Appeals Chamber of the SCSL and the Supreme Court Chamber of the ECCC in which sentencing issues have been considered.¹¹ All relevant separate and dissenting opinions of the judges of the SCSL, ECCC and ICC have been included in the analysis. Decisions relating to the sentencing of individuals for contempt of court have not been included on the basis that such decisions do not concern the imposition of sentences for core international crimes and are not, therefore, of a similar nature to the other decisions included in the study.

The analysis used in the study is largely qualitative. However, some numerical data has been included in relation to readily quantifiable concepts, namely the frequency of reference to external jurisprudence and the range of institutions that have been referred to. For the purposes of quantifying references to the decisions of other courts and tribunals, reference to several decisions from the same institution have been treated as

⁸ *Brima, Kamara and Kanu* SCSL-04-16 (Sentencing Judgment, 19 July 2007); *Fofana and Kondewa* SCSL-04-14-T (Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007); *Sesay, Kallon and Gbao* SCSL-04-15-T (Sentencing Judgment, 8 April 2009); *Taylor* SCSL-03-01-T (Sentencing Judgment, 30 May 2012).

⁹ *Duch*, 001/18-07-2007/ECCC/TC (Judgment, 26 July 2010).

¹⁰ *Lubanga* ICC-01/04-01/06-2901 (Decision on Sentence Pursuant to Article 76 of the Statute, 10 July 2012); *Katanga* ICC-01/04-01/07-3484 (Décision Relative à la Peine (Article 76 du Statut), 23 Mai 2014).

¹¹ *Brima, Kamara and Kanu* SCSL-04-16-A (Judgment, 22 February 2008); *Fofana and Kondewa* SCSL-04-14-A (Judgment, 28 May 2008); *Sesay, Kallon and Gbao* SCSL-04-15-A (Judgment, 26 October 2009); *Taylor* SCSL-03-01-A (Judgment, 26 September 2013); *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012).

one citation where they concerned the same legal issue.¹² If it was unclear whether or not the matter being addressed should be treated as one issue or two separate issues, it was presumed that there were two. Where judges have addressed sentencing issues alongside other matters in the course of their decisions, the analysis has been limited to the parts of the decisions where sentencing has been considered.

Throughout the chapter, the term ‘judicial cross-referencing’ has been used to describe the practice of a judge in one institution referring to the decisions of a judge in another.¹³ The term has been used to refer to the simple act of reference to the decision of another judicial institution without indicating the way in which the decision has been used.

3. JUDICIAL CROSS-REFERENCING IN INTERNATIONAL SENTENCING DECISIONS: INSIGHTS INTO THE EMERGING PRACTICE

The following sections highlight different aspects of the practice of judicial cross-referencing in the sentencing decisions of the SCSL, the ECCC and the ICC. The implications of the patterns and trends identified in these sections are discussed in Section 4 below.

3.1 Views on the Relevance of External Jurisprudence

On a number of occasions, judges of the SCSL, the ECCC and the ICC have discussed the significance of the practice of other courts and tribunals for their own deliberations. The case law of the SCSL and the ECCC indicates a different attitude towards reference to the decisions of the courts of the territorial State, on the one hand, and reference to the decisions of international courts and tribunals, on the other.

The judges of the SCSL and the ECCC have considered the significance of the practice of domestic courts of the territorial State in their sentencing decisions. The judges of the SCSL are in a similar position to the judges of the *ad hoc* Tribunals in that the statutes of all three institutions require their judges to ‘have recourse to’ the practice of the national courts of the territorial State.¹⁴ In their sentencing decisions, the judges of the SCSL have tended to adopt a similar approach to the *ad hoc* Tribunals in finding that the statutory requirement does not impose an obligation on the Trial Chamber to conform to the practice of domestic courts, but rather to ‘take into account

¹² For example, if a Chamber cited a number of decisions of the ICTY in considering whether a certain form of conduct could be considered as a mitigating factor, this would be treated as one citation of the case law of the ICTY. If the Chamber cited decisions from the ICTY to establish the goals underpinning the sentencing process and to establish whether or not certain conduct could be considered in mitigation, this would be treated as two separate citations.

¹³ The term ‘judicial cross-referencing’ has been used in this chapter to avoid use of the loaded term ‘precedent’. See discussion in Miller (n 3) 488.

¹⁴ Art. 24(1) ICTYSt; Art. 23(1) ICTRSt; Art. 19(1) SCSLSt.

that practice as and when appropriate'.¹⁵ In the *AFRC* case, the Trial Chamber of the SCSL concluded that it was 'not appropriate' to adopt the practice of the national courts of Sierra Leone since none of the accused had been indicted for, or convicted of, offences under Article 5 of the Statute, namely crimes under Sierra Leonean law.¹⁶

The judges of the ECCC have also indicated their reluctance to draw from the practice of domestic courts in Cambodia when determining the sentences that should be imposed on individuals for the commission of international crimes. In the *Duch* case, the Trial Chamber of the ECCC considered that 'the international nature of the crimes for which the Accused has been convicted, and the uncertainties and complexities evident in the evolution of Cambodian criminal law from the 1956 Penal Code onwards, rules out the direct application of Cambodian sentencing provisions'.¹⁷ The Chamber did, however, indicate that it would 'seek guidance from' Cambodian sentencing principles and factors in determining the sentence of the accused.¹⁸

In the cases referred to above, the SCSL and the ECCC were only considering the significance of the practice of the domestic courts of the territorial State. The tendency of judges of the SCSL to refer to the practice of the domestic courts of other States will be discussed further in the section below.¹⁹

While judges of the SCSL and the ECCC have shown some reticence in following the practice of the domestic courts of the territorial State in their sentencing decisions, the Chambers of all three institutions have expressed their readiness to take into consideration the sentencing practice of other international criminal courts and tribunals when faced with gaps and ambiguities in their own legal frameworks, even where there is no statutory provision expressly requiring them to do so.

At the SCSL reference to case law of the ICTR has a statutory basis. In addition to requiring judges to have recourse to the practice of domestic courts, Article 19(1) of the SCSLSt places an obligation on judges of the SCSL to have recourse to 'the practice regarding prison sentences in the [ICTR]'. No such reference is made to the sentencing decisions of the ICTY. Nonetheless, judges of the SCSL have confirmed their readiness to 'consider' the sentencing practice of the ICTY on the basis that the provisions of the ICTYSt are 'analogous to those of the Special Court and the ICTR'.²⁰ In the *CDF* case, the Trial Chamber of the SCSL described the sentencing practice of both institutions as 'instructive'.²¹ The approach of the Trial Chamber was, however, criticized by Justice

¹⁵ *Brima, Kamara and Kanu* SCSL-04-16 (Sentencing Judgment, 19 July 2007) para 32; *Taylor* SCSL-03-01-T (Sentencing Judgment, 30 May 2012) para 37.

¹⁶ *Brima, Kamara and Kanu* SCSL-04-16 (Sentencing Judgment, 19 July 2007) para 32. In the *Taylor* case, the Trial Chamber also emphasized that 'Mr Taylor was not indicted for, nor convicted of, offences under Article 5 of the SCSLSt in the Sierra Leonean law' before noting the approach of the law of Sierra Leone to the sentencing of accessories to crimes. See *Taylor* SCSL-03-01-T (Sentencing Judgment, 30 May 2012) para 37.

¹⁷ *Duch* 001/18-07-2007/ECCC/TC (Judgment, 26 July 2010) para 577.

¹⁸ *Ibid.*, para 578.

¹⁹ See Section 3.2.

²⁰ *Brima, Kamara and Kanu* SCSL-04-16 (Sentencing Judgment, 19 July 2007) para. 33. *Taylor* SCSL-03-01-T (Sentencing Judgment, 30 May 2012) para 36.

²¹ *Fofana and Kondewa* SCSL-04-14-T (Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007) para 41.

Gelaga King of the Appeals Chamber on the basis that Article 19(1) of the SCSLSt does not make reference to the practice of the ICTR's sister tribunal.²²

Judges of the ICC have also indicated that the decisions of the *ad hoc* Tribunals provide a potential source of guidance in their sentencing decisions, despite the absence of an express provision in the ICCSt requiring them to consider the decisions of other judicial institutions.²³ When discussing the relevance of external jurisprudence to the sentencing of Mr Thomas Lubanga Dyilo, the Trial Chamber of the ICC rightly noted that 'the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute'.²⁴ However, it went on to acknowledge that 'the *ad hoc* tribunals are in a comparable position to the Court in the context of sentencing', indicating the potential significance of their case law as a source of guidance for the ICC.²⁵

The judges of the ECCC have taken a similar approach. In the *Duch* case the Trial Chamber of the ECCC noted that it would 'seek guidance from' international, as well as Cambodian, sentencing principles in exercising its discretion in the determination of sentence.²⁶ On appeal the Supreme Court Chamber also explained that in the absence of 'comparable jurisprudence before Cambodian domestic courts' it had 'examined sentences of other international criminal tribunals addressing similar or comparable issues' as a source of guidance.²⁷

While the judges of all three institutions have been receptive of the case law of other international criminal courts and tribunals, they have also indicated that factors might stand in the way of consistency with the approaches taken by judges working elsewhere. Judges have drawn attention, in particular, to the need to ensure that the sentences they impose reflect the individual circumstances of the case and the conduct of the accused.²⁸

3.2 The Frequency of Judicial Cross-referencing and Range of Institutions Referred to

All of the decisions that have been included in this study contain instances of judicial cross-referencing. References to external jurisprudence can be found in the decisions of

²² *Fofana and Kondewa* SCSL-04-14-A (Judgment, 28 May 2008) Dissenting Opinion of Justice Gelaga King paras 112–113.

²³ Art. 21 ICCSt, which outlines the applicable law of the ICC, only makes reference to the ICC's own prior decisions. See Art. 21(2) ICCSt ('The Court may apply principles and rules of law as interpreted in its previous decisions').

²⁴ *Lubanga* ICC-01/04-01/06-2901 (Decision on Sentence Pursuant to Article 76 of the Statute, 10 July 2012) para 12.

²⁵ *Ibid.*

²⁶ *Duch* 001/18-07-2007/ECCC/TC (Judgment, 26 July 2010) para 578.

²⁷ *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012) para 374. See also *Duch* 001/18-07-2007/ECCC/TC (Judgment, 26 July 2010) 578.

²⁸ *Brima, Kamara and Kanu* SCSL-04-16 (Sentencing Judgment, 19 July 2007) para 11. *Taylor* SCSL-03-01-A (Judgment, 26 September 2013) para 705; *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012) para 374.

both trial and appeals chambers, and in separate and dissenting opinions of individual judges, as well majority decisions.

Overall, judges of the ICC have referred to the decisions of other courts and tribunals less frequently than the judges of the SCSL and the ECCC. The number of instances of judicial cross-referencing identified in the sentencing decisions of the SCSL, the ECCC and the ICC are shown in Table 7.1 below.

Table 7.1 Table showing the institutions referred to and the frequency of judicial cross-referencing

Institution	Instances of Judicial Cross- Referencing: Trial Chamber	Instances of Judicial Cross- Referencing: Appeals Chamber	Instances of Judicial Cross- Referencing: Separate Opinions	Instances of Judicial Cross- Referencing: Total	Average number of citations per decision*
SCSL	104	75	0	179	22.4
ECCC	24	31	10	55	27.5
ICC	17	0	0	17	8.5

Note: *This column shows the total number of instances of judicial cross-referencing divided by the number of sentencing decisions that have been included in the analysis for each institution.

When divided by the number of decisions included in the analysis, this suggests a frequency of judicial cross-referencing of 22.4 references per decision at the SCSL, 27.5 references per decision at the ECCC and 8.5 references per decision at the ICC.

The lower rate of reference to external jurisprudence by judges of the ICC may reflect a desire to distinguish the first permanent international criminal court from its predecessors and contemporaries. However, it may also be attributable to the attitude of individual judges towards the citation of external jurisprudence and the nature of the issues that have been raised in the sentencing decisions of the ICC to date.

Figures 7.1, 7.2 and 7.3 below indicate the range of institutions that judges have referred to in their sentencing decisions and the frequency of reference to the decisions of each institution.

The above figures indicate that judges have been more willing to refer to the decisions of other international(ized) criminal courts and tribunals than they have been to refer to other international, regional or domestic courts or tribunals. References to the case law of the *ad hoc* Tribunals are particularly frequent. This is, perhaps, unsurprising, given the large quantity of sentencing decisions that the two institutions have produced. The high frequency of reference to the decisions of the *ad hoc* Tribunals may also be influenced by the movement of judges, legal officers and other court staff from the *ad hoc* Tribunals to the institutions that form the focus of this study.

The judges of the SCSL, ECCC and the ICC have all referred to the case law of the ICTY more frequently than to that of the ICTR. This is particularly noteworthy in the context of the SCSL since the SCSLSt makes no mention of the practice of the ICTY,

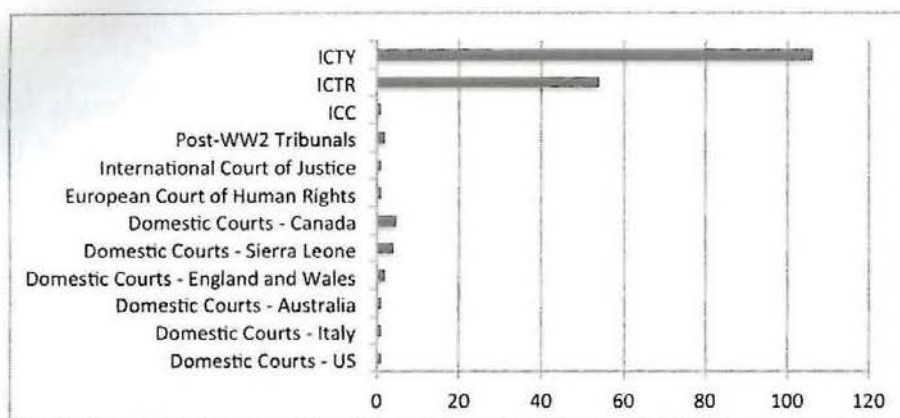


Figure 7.1 Reference to external jurisprudence in the sentencing decisions of the SCSL

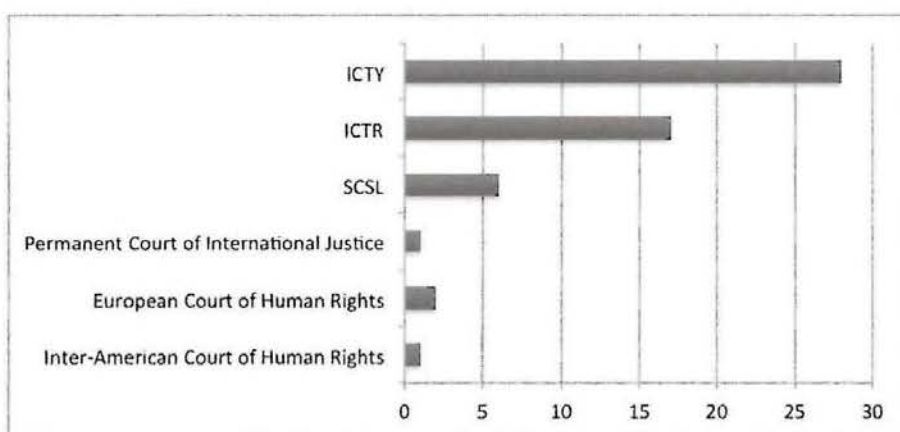


Figure 7.2 Reference to external jurisprudence in the sentencing decisions of the ECCC

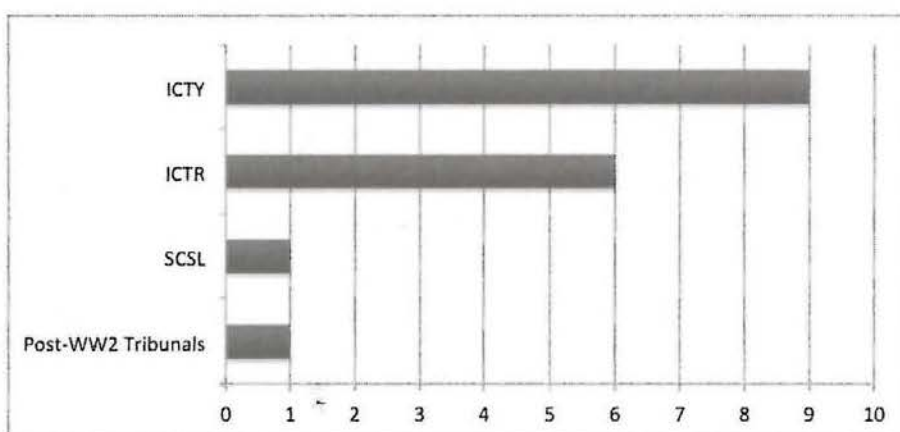


Figure 7.3 Reference to external jurisprudence in the sentencing decisions of the ICC

whereas it does require judges to have recourse to the practice of the ICTR.²⁹ The tendency of judges to refer more frequently to the case law of the ICTY than that of the ICTR may be explained by the number of sentencing decisions that the ICTY has produced, as well as the range of crimes that it has addressed.

Both the ICC and the ECCC have made reference to the case law of the SCSL, suggesting that the legacy of the Special Court, which has now completed its mandate and transition to a residual mechanism, may also live on in the sentencing decisions of other courts and tribunals.³⁰ It should, however, be noted that the reference to the case law of the SCSL by the judges of the ICC in the *Lubanga* case was made primarily for the purpose of highlighting the sentences that the SCSL had rendered for crimes under the consideration of the ICC.³¹ There is no indication that the case law influenced the final decision of the Trial Chamber regarding the sentence to be imposed on the accused.

The case law of the ICC has only been referred to on one occasion in the sample of decisions studied. The infrequent reference to the case law of the ICC can be attributed, at least in part, to the fact that the ICC has only produced two sentencing decisions, both of which were rendered after the majority of decisions included in this study had been produced. The sole reference to the case law of the ICC is found in the judgment of the SCSL Appeals Chamber in the *Taylor* case.³² In that case, the Appeals Chamber rejected the finding of the Trial Chamber that aiding and abetting generally warrants a lesser sentence than other forms of participation in international crimes.³³ In support of its approach, the Chamber made reference to the law of several domestic legal systems, including that of Sierra Leone, as well as the practice of the *ad hoc* Tribunals and post-World War II case law.³⁴ It also made reference to the Separate Opinion of Judge Adrian Fulford to the final judgment of the Trial Chamber in the *Lubanga* case, which noted Judge Fulford's reluctance to accept that it would 'assist the work of the Court to establish a hierarchy of seriousness that is dependent on creating rigorous distinctions between the modes of liability' contained in the ICCSt.³⁵

The reference of the SCSL Appeals Chamber to the Separate Opinion of Judge Fulford highlights the importance of separate opinions and the influence that they can have on the development of international law in subsequent cases, perhaps even in other institutions. It also suggests that the practice of judicial cross-referencing is not

²⁹ Art. 19(1) SCSLSt.

³⁰ See *Duch* 001/18-07-2007/ECCC/TC (Judgment, 26 July 2010) paras 580, 583, 584, 587, 591. *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012) Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe para 27. *Lubanga* ICC-01/04-01/06-2901 (Decision on Sentence Pursuant to Article 76 of the Statute, 10 July 2012) paras 12–15.

³¹ *Lubanga*, *ibid.*

³² *Taylor* SCSL-03-01-A (Judgment, 26 September 2013) para 666, footnote 1945.

³³ *Ibid.*, para 666.

³⁴ *Ibid.*, paras 666–669.

³⁵ *Ibid.*, para 666, footnote 1945. Judge Fulford went on to say that '[w]hilst it might have been of assistance to "rank" the various modes of liability if, for instance, sentencing was strictly determined by the specific provision on which an individual's conviction is based, considerations of this kind do not apply to the ICC'.

driven only by the formal nature of the decision being referred to, but also the quality of reasoning contained within it or the conclusions that have been drawn. In the same decision, and in relation to the same point, the SCSL Appeals Chamber also made reference to the Separate Opinion of Judge David Hunt in the ICTY's *Milutinović* case in support of its reasoning.³⁶

Judges of the SCSL and the ICC have shown a tendency to refer not only to recent case law within the field of international criminal law; they have also referred to post-World War II case law of the Allied Military Tribunals on several occasions. In addition to the decision of the SCSL Appeals Chamber in the *Taylor* case already discussed, reference can be found in the SCSL Appeals Chamber's decision in the *CDF* case and in the ICC's *Katanga* case.³⁷ On both of these occasions, the case law was used to support the proposition that while mitigating circumstances may influence the sentence imposed, they do not alter the gravity of the crime.

The SCSL is the only institution of the three that have been studied that has made reference to the decisions of domestic courts and tribunals in the course of its sentencing decisions. More often than not, where judges have referred to the decisions of domestic courts, the courts referred to are not those of a State with a clear jurisdictional link to the crimes being addressed. For example, when considering the objectives underpinning international sentencing in the *CDF* case, the Trial Chamber of the SCSL referred to and expressly adopted the definition of retribution that had been offered by Lamer J of the Supreme Court of Canada. In the same case, the Trial Chamber of the SCSL referred to a range of domestic courts when considering the applicability of the doctrine of necessity as a defence.³⁸ The Appeals Chamber also made reference to the decisions of the domestic courts of Australia, the UK and Canada when considering the alleged error of the Trial Chamber in holding that the sentences imposed on the accused would run concurrently.³⁹ Having reviewed the relevant jurisprudence, the Appeals Chamber of the SCSL concluded that 'Trial Chambers typically enjoy broad discretion to choose between concurrent and consecutive sentences'.⁴⁰

While judges have tended to refer to other criminal justice mechanisms in the course of their decision-making, they have, on occasion, looked beyond institutions that focus on the criminal responsibility of individuals and have turned to institutions concerned primarily with the responsibility of States. The decisions included in the study contained several references to the case law of regional human rights courts. One example can be found in the *Duch* case before the ECCC: the Trial Chamber referred to the case law of the ECtHR when considering the impact of prior violations of the rights of the accused – in this case, a period of unlawful detention – on the sentence issued by

³⁶ Ibid.

³⁷ *Fofana and Kondewa* SCSL-04-14-A (Judgment, 28 May 2008) para 519. *Katanga* ICC-01/04-01/07-3484 (Décision Relative à la Peine (Article 76 du Statut), 23 Mai 2014) para 77.

³⁸ *Fofana and Kondewa* SCSL-04-14-T (Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007) paras 73–75. The Chamber referred to the case law of Canada, the US and England and Wales.

³⁹ *Fofana and Kondewa* SCSL-04-14-A (Judgment, 28 May 2008) paras 456–550.

⁴⁰ Ibid., para 547.

the Trial Chamber.⁴¹ The Chamber referred to the case law of the ECtHR to support its finding that the reduction in sentence 'must be express and measurable and based on the totality of the circumstances of the case'.⁴² The case law of the I-ACtHR was also referred to by two judges of the Supreme Court Chamber of the ECCC when addressing the same issue on appeal.⁴³ The case law was used to establish that the period of detention had been unlawful, to reflect on the purpose of a remedy under international law and to support the finding that an appropriate remedy for excessive or unlawful detention is a reduction in sentence.⁴⁴

Judges have also referred to general principles of law that have been developed by the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ). Reference to the case law of the PCIJ can be found in the Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Kavasinghe to the Judgment of the Supreme Court Chamber of the ECCC in the *Duch* case. In their joint opinion, the two judges referred to the PCIJ's *Chorzow Factory* case when discussing the appropriate remedy to be imposed in respect of a period of unlawful detention.⁴⁵

There was just one reference to the case law of the ICJ in the decisions included in the study. In the *Taylor* case, the Trial Chamber of the SCSL referred to the case law of the ICJ in concluding that the extraterritorial nature of the criminal acts of the accused could be taken into consideration as an aggravating factor.⁴⁶ It cited the findings of the ICJ in the *Nicaragua* case concerning the implications of State support for an organization in another State and the principles of non-intervention and the prohibition on the use of force.⁴⁷ While acknowledging that these customary provisions govern the conduct between States, the Chamber held that 'violation of [the principle of non-intervention] by a Head of State individually engaging in criminal conduct can be taken into account as an aggravating factor'.⁴⁸

On appeal, the defence argued that the *Taylor* Trial Chamber had erred in 'erroneously apply[ing] customary international law principles of state responsibility to find that the extraterritoriality of conduct by a head of State is an aggravating factor relevant to sentencing'.⁴⁹ The Appeals Chamber found that while it was 'unnecessary for the Trial Chamber to refer to public international law in order to take into consideration the

⁴¹ *Duch* 001/18-07-2007/ECCC/TC (Judgment, 26 July 2010) para 625.

⁴² *Ibid.*

⁴³ *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012) Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Kayasinghe paras 14, 18, 19.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, para 18, citing *Chorzow Factory* Series A no 17/13 (Merits Judgment 'Claim for Indemnity', 13 September 1928) 47. The PCIJ had held that 'reparation must, as far as possible, wipe-out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.

⁴⁶ *Taylor* SCSL-03-01-T (Sentencing Judgment, 30 May 2012) para 27.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* Citing *Nicaragua v United States* (Merits Judgment 'Military and Paramilitary Activities in and against Nicaragua', 27 June 1986) ICJ Reports para 209.

⁴⁹ *Taylor* SCSL-03-01-A (Judgment, 26 September 2013) para 680.

extraterritorial nature and consequences of Taylor's acts and conduct', these factors were 'directly related to Taylor and the gravity of his culpable conduct, justifying holding him responsible'.⁵⁰ Consequently, in the one decision where the ICJ has been cited, the relevance of its case law was called into question.

Overall, the content analysis indicates that while the judges of the SCSL, the ECCC and the ICC have tended to refer most frequently to other international(ized) criminal justice institutions, they have been willing to refer to a wider range of institutions where warranted by the issues raised in the case. References to post-World War II case law and decisions of the PCIJ suggest that the practice of judicial cross-referencing is not confined to recent cases and that judges are willing to look back to older case law that supports the arguments that they wish to make. Furthermore, references to separate opinions of judges of other courts and tribunals also indicate that the practice is driven not only by the weight or authority of the decision referred to, but also by the reasoning included in the decision or the arguments that have been put forward.

3.3 Issues Prompting Reference to External Jurisprudence

In their sentencing decisions judges have referred to the decisions of other courts and tribunals in relation to a range of legal issues. A large proportion of the instances of judicial cross-referencing contained in the sentencing decisions of the SCSL, the ECCC and the ICC concerned the aggravating and mitigating factors to be considered in the determination of sentence to be imposed on the accused. Judges frequently referred to external jurisprudence to establish what conduct could be considered in aggravation or mitigation of sentence, to determine the standard of proof that must be met in order for an aggravating or mitigating factor to be considered and in determining the weight such factors should be given.

The judges of the three institutions also made frequent reference to the decisions of other courts and tribunals in order to establish or confirm the existence of general principles to guide the sentencing process. Such general principles include the prohibition on double counting, whereby the same factor must not influence the sentence of the convicted person twice,⁵¹ and the totality principle, according to which a Trial Chamber must impose a sentence which reflects the totality of the convicted person's culpable conduct, including the gravity of the conduct, the circumstances of the case and the form and degree of participation of the accused.⁵² The discretion of the Trial Chamber to impose cumulative or consecutive sentences on individuals convicted of multiple crimes,⁵³ and the practice of imposing a single 'global' sentence for multiple convictions,⁵⁴ also prompted a number of references to external jurisprudence.

On several occasions judges made reference to external jurisprudence when considering the goals or objectives that underpin the sentencing process. In the *CDF* case, for

⁵⁰ Ibid., para 683.

⁵¹ See, for example, *Lubanga* ICC-01/04-01/06-2901 (Decision on Sentence Pursuant to Article 76 of the Statute, 10 July 2012) para 35.

⁵² See, for example, *Taylor* SCSL-03-01-A (Judgment, 26 September 2013) para 662.

⁵³ See, e.g., *ibid.*, para 9.

⁵⁴ See, e.g., *ibid.*, para 10.

example, the Appeals Chamber of the SCSL listed several goals that had been 'recognized by the ICTY as legitimate sentencing processes', including individual and general deterrence, individual and general prevention, retribution, public reprobation and stigmatisation by the international community, and rehabilitation.⁵⁵ The Chamber cited relevant case law from the ICTY in relation to each of the listed goals. In the same case, the Appeals Chamber also referred to case law of the ICTY to support its finding that '[t]he primary objectives must be retribution and deterrence'.⁵⁶ As already noted, the SCSL Trial Chamber has also referred to the definition of retribution provided by Lamer J of the Supreme Court of Canada.⁵⁷ These references reflect an assumption that there are common goals underpinning the imposition of sentences by different international(ized) criminal courts and tribunals, and that at least some of those goals are also shared with domestic criminal justice institutions.

As noted above, judges have also cited the decisions of other courts and tribunals as a point of reference when considering the length of sentence imposed on the accused. Often such comparative reflection has been prompted by the parties to the proceedings, who have cited the practice of other judicial institutions as a means of challenging the sentences imposed by the relevant trial chambers. An example of this practice can be found in the judgment of the SCSL Appeals Chamber in the *RUF* case. On appeal, one of the defendants, Augustine Gbao, argued that the sentence that had been imposed by the Trial Chamber was inconsistent with the jurisprudence of the *ad hoc* Tribunals and previous cases before the SCSL.⁵⁸

In response to Gbao's challenge, the SCSL Appeals Chamber expressly 'endorse[d] the view of the ICTY Appeals Chamber that sentences of like individuals in like cases should be comparable'.⁵⁹ However, the Chamber went on to emphasize that the relevance of previous sentences is often limited due to differences in, among other things, 'the number, type and gravity of the crimes committed, the personal circumstances of the convicted person and the presence of mitigating and aggravating circumstances'.⁶⁰ The Appeals Chamber recognized that 'a disparity between an impugned sentence and another sentence rendered in a like case can constitute an error if the former is out of reasonable proportion with the latter'.⁶¹ However, it found that the cases cited by Gbao were 'readily and significantly distinguished from the present

⁵⁵ *Fofana and Kondewa* SCSL-04-14-A (Judgment, 28 May 2008) para 532.

⁵⁶ *Ibid.*

⁵⁷ The Chamber adopted the definition of retribution that had been provided by Lamer J who had held that '[r]etribution, in a criminal context, by contrast [to vengeance] represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender'. See *Fofana and Kondewa* SCSL-04-14-T (Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007) para 27.

⁵⁸ *Sesay, Kallon and Gbao* SCSL-04-15-A (Judgment, 26 October 2009) para 1296. The Appeals Chamber noted that 'Gbao contends that his analysis of the sentences imposed in these cases demonstrates that his own sentence is "so disproportionate as to amount to an unprecedented and irrational act of judicial retribution"'.

⁵⁹ *Ibid.*, para 1317.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, para 1318. According to the Chamber, while a disparity would not in itself be erroneous, it may infer that the Trial Chamber 'failed to exercise its discretion properly in applying the law on sentencing'.

case' and were not, therefore, instructive.⁶² The SCSL Appeals Chamber took a similar approach in the *Taylor* case.⁶³

The Supreme Court Chamber of the ECCC has adopted similar reasoning. In their appeal of the Trial Chamber's sentencing judgment, the co-prosecutors argued that the Trial Chamber had 'fail[ed] to give reasons for the Trial Chamber's decision to impose a thirty-five year sentence on Kaing Guek Eav, and ha[d] therefore determined the sentence arbitrarily without relying upon any jurisprudence from comparable cases and the relevant law cited by the Co-Prosecutor at trial'.⁶⁴ While the Supreme Court Chamber acknowledged the need to 'take into account the circumstances of individual cases and accused persons, and the risk of relying on dissimilar cases', it recognized the sentences imposed by other international criminal tribunals in relation to 'similar or comparable facts and issues' as 'a source of guidance' in revising the sentence imposed on the accused.⁶⁵

The case law referred to above demonstrates the willingness of judges to refer to external jurisprudence not only to identify and elaborate upon principles that guide the sentencing process and the factors that judges should take into account in the course of their sentencing decisions, but also to consider the final sentences that have been imposed by other judicial institutions, even if they cannot, in practice, be followed.

3.4 The Use of External Jurisprudence in International Sentencing Decisions

The references to external jurisprudence found in the decisions of the SCSL, the ECCC and the ICC can be separated into two categories: those that are used in the reasoning of the judges and those that have more of a background, or 'scene-setting' function. An example of the latter can be found in the decision of the Trial Chamber of the ICC in the *Lubanga* case. The Trial Chamber acknowledged that 'the only convictions by an international criminal tribunal for the recruitment or use of child soldiers are from the Special Court for Sierra Leone' and summarized the decisions that had been rendered.⁶⁶ While the sentencing decisions of the SCSL may have influenced the reasoning of the judges, the Trial Chamber did not connect the decisions of the SCSL to its own reasoning or the sentence that it imposed on the accused.

Other instances of judicial cross-referencing that can be placed in the 'scene-setting' category are found in the sections of sentencing decisions that set out the arguments of the parties to the proceedings. Although these instances of judicial cross-referencing are often not immediately connected with the reasoning of the Chamber, the cases cited by

⁶² Ibid., para 1319.

⁶³ The Appeals Chamber found that '[t]he totality principle requires an individualized assessment of the particular circumstances of the case. As such, any attempt to compare an accused's case with others that have already been the subject of final determination is of limited assistance in challenging a sentence'. *Taylor* SCSL-03-01-A (Judgment, 26 September 2013) para 705.

⁶⁴ *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012) para 357.

⁶⁵ Ibid., para 374.

⁶⁶ *Lubanga* ICC-01/04-01/06-2901 (Decision on Sentence Pursuant to Article 76 of the Statute, 10 July 2012) paras 12–15.

the parties are frequently returned to and discussed in greater depth in the sections of the sentencing decision that contain the deliberations of the judges.

Where judges have referred to the case law of other courts and tribunals in the course of their own deliberations, the references have generally been used to support the reasoning of the relevant Chamber. Often judges have simply supported their reasoning with a footnote containing reference to relevant external jurisprudence.⁶⁷ On some occasions, however, judges have emphasized the fact that their reasoning is consistent with the case law of other courts and tribunals in the text of their decision. In the *RUF* case, for example, having concluded that the location of an attack could be considered as part of the gravity of the offence or as an aggravating factor, the Appeals Chamber stressed that its finding was 'consistent with the case law of the Trial Chambers at the Special Court and the ICTR'.⁶⁸

Judges have shown a tendency to cite the decisions of other courts and tribunals even where they have been able to refer to previous case law from their own institutions. In the *Taylor* case, for example, the Appeals Chamber of the SCSL referred to previous decisions of the SCSL and the ICTY in holding that sentences imposed must '[reflect] the totality of the convicted person's culpable conduct'.⁶⁹

In some instances, judges have supported their decisions by reference to the law and practice of a range of other courts and tribunals. An example of this practice can be found in the *Duch* case before the ECCC. In its decision, the Trial Chamber discussed the permissibility of imposing a single (global) sentence on an individual convicted of several offences.⁷⁰ The Chamber reviewed the practice of the Nuremberg and Tokyo Tribunals, the *ad hoc* Tribunals and the SCSL, the ICCSt and the practice of Cambodian courts before determining that 'it may impose a single sentence that reflects the totality of the criminal conduct where an accused is convicted of multiple offences'.⁷¹

The tendency of judges to support their reasoning with the case law of other courts and tribunals may be motivated by a number of different factors, including the desire of judges to give their reasoning greater weight or authority, or to promote a sense of consistency in the interpretation and application of international law. It may, however, simply indicate the factors that the judges have considered, or the points of reference that judges have used, in the course of their reasoning.

On occasion, judges have indicated the weight that they have given to external jurisprudence in the course of their decisions. In a number of decisions, the case law of other courts and tribunals have been referred to as a source of 'guidance', indicating that it has influenced the reasoning of the judges, albeit to an unspecified degree. It has already been highlighted that in the *Duch* case, the Supreme Court Chamber of the ECCC considered the sentencing practice of other international criminal tribunals to

⁶⁷ In the *Lubanga* case, for example, having recounted the principle of double counting, the Trial Chamber of the ICC included a footnote citing case law of the ICTY which articulated the principle to which the Chamber was referring. See *Lubanga*, *ibid.*, para 35.

⁶⁸ *Sesay, Kallon and Gbao* SCSL-04-15-A (Judgment, 26 October 2009) para 1275.

⁶⁹ *Taylor* SCSL-03-01-A (Judgment, 26 September 2013) para 662.

⁷⁰ *Duch* 001/18-07-2007/ECCC/TC (Judgment, 26 July 2010) paras 587–590.

⁷¹ *Ibid.*, para. 590.

offer a source of guidance in determining the final sentence to be imposed on the accused.⁷² The Trial Chamber of the ECCC also referred to the case law of the ICTR as a source of 'helpful guidance' in determining the impact of a prior violation of the rights of the accused on the sentence imposed by the Trial Chamber.⁷³

In some decisions, judges have expressly 'adopted' aspects of the reasoning of other courts and tribunals. The judges of the SCSL have done so on a number of occasions. In the *Taylor* case, the SCSL Trial Chamber 'adopt[ed] the jurisprudence of the ICTY and ICTR that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation'.⁷⁴ In the *RUF* case, the Appeals Chamber of the SCSL 'adopt[ed] the view of the ICTY Appeals Chamber that the fact that the aggravating circumstances "must relate to the offender himself is not to be taken as a rule that such circumstance must specifically pertain to the offender's personal characteristics (...)".⁷⁵ Similarly, in the *Duch* case, the Supreme Court Chamber of the ECCC 'agree[d] with and adopt[ed]' the standard that had been articulated by the ICTY Appeals Chamber regarding the standard of review that should be followed when assessing the sentence imposed by the Trial Chamber.⁷⁶

Another example of the adoption of the reasoning of the ICTY by the SCSL can be found in the *RUF* case. When addressing the permissibility of cumulative convictions, the Appeals Chamber acknowledged that '[t]he jurisprudence on cumulative convictions has been thoroughly addressed at the international tribunals' and that '[t]he test to determine the permissibility of cumulative convictions was set out in the *Čelebići* Appeals Judgment'.⁷⁷ This case, and those considered above, indicate that a direct transfer of reasoning is taking place between different international(ized) criminal justice institutions.

In the decisions included in this study, there are a small number of instances where judges used the term 'precedent' when referring to the case law of other courts and tribunals. One example is found in the *CDF* case before the SCSL, where the Trial Chamber '[applied] the precedent' of the English case of *Dudley and Stephens* in holding that necessity could not be sustained as a defence in the case under consideration.⁷⁸ In the *Taylor* case, the Trial Chamber of the SCSL also made reference to the 'precedents' of the *ad hoc* Tribunals when responding to the submission of the defence that 'a Trial Chamber may only consider aggravating circumstances that have been pleaded in the indictment'.⁷⁹ According to the Trial Chamber, the 'precedents' of the *ad hoc* Tribunals suggested that this was not the case.⁸⁰ While the term 'precedent'

⁷² *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012) para 374. See Section 3.3 above.

⁷³ *Duch* 001/18-07-2007/ECCC/TC (Judgment, 26 July 2010) para 625.

⁷⁴ *Taylor* SCSL-03-01-T (Sentencing Judgment, 30 May 2012) para 21.

⁷⁵ *Sesay, Kallon and Gbao* SCSL-04-15-A (Judgment, 26 October 2009) para 1276.

⁷⁶ *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012) para 354.

⁷⁷ *Sesay, Kallon and Gbao* SCSL-04-15-A (Judgment, 26 October 2009) para 1190.

⁷⁸ *Fofana and Kondewa* SCSL-04-14-T (Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007) para 74.

⁷⁹ *Taylor* SCSL-03-01-T (Sentencing Judgment, 30 May 2012) para 30.

⁸⁰ *Ibid.*

may be associated with the doctrine of *stare decisis*,⁸¹ or a sense of obligation to follow prior decisions, there is no indication that judges of the SCSL considered the case law that they were referring to was in any way binding on them.

While judges have generally followed, or reasoned in accordance with, the case law cited in their decisions, there are a few occasions where judges have distinguished or departed from the decisions of other courts or tribunals. In most instances where judges have departed from external case law, they have tended to distinguish the facts of their own cases from those considered by other institutions. The decision of the Trial Chamber of the SCSL in the *CDF* case provides a good example of this practice. When considering the significance of the circumstances prevailing at the time of the atrocities as a mitigating factor, the Trial Chamber distinguished its case from previous decisions of the *ad hoc* Tribunals.⁸² It reasoned as follows:

The Chamber has taken note of some significant and enlightening precedents on sentencing principles from sister International Criminal Tribunals of the ICTY and ICTR that have been cited by the Parties. However, even though the statutorily oriented sentencing principles in those cases remain relevant in guiding and assisting us to arrive at a decision in this case, it is pertinent to note that there is an important factual and contextual difference and distinction that the Chamber would like to draw between those cases as against this one which we consider relevant and pertinent in scaling the sentences that we are about to hand down on the Accused Persons in relation to the Counts for which we have found them guilty.⁸³

The Chamber went on to highlight, as the 'main distinguishing factor', the fact that the *CDF/Kamajors*, with which the accused were associated, was fighting for a legitimate cause, namely 'to restore the democratically elected Government of President Kabbah which had been illegally ousted through a [*Coup d'Etat*]'.⁸⁴

In the same case, the Trial Chamber noted that while it had the discretion to impose a global sentence in relation to the crimes committed, it had decided to impose separate sentences on the basis that this would 'better [reflect] the culpability of the Accused for each offence for which they were convicted, given that distinct crimes were committed by each Accused in discrete geographical areas'.⁸⁵ The Chamber distinguished cases from the ICTY 'in which global sentences were held to be appropriate where the crimes occurred in one geographical location or where the crimes all formed part of one transaction'.⁸⁶

Another factor that has led judges to depart from the decisions of other courts and tribunals is variation in the nature and function of different judicial institutions. An example can be found in the Separate Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe to the judgment of the Supreme Court Chamber in the *Duch* case. In their separate opinion, the two judges disagreed with the reasoning of the majority regarding the consequences of unlawful pre-trial detention for the

⁸¹ See discussion in Miller (n 3) 488.

⁸² *Fofana and Kondewa* SCSL-04-14-T (Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007) para 82.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, para 83.

⁸⁵ *Ibid.*, para 97.

⁸⁶ *Ibid.*, para 97 fn 139.

sentence imposed on the accused. The majority had adopted the approach of the *ad hoc* Tribunals, which had required the existence of a link between the sentencing court and the illegality of the detention in order for a remedy to be granted.⁸⁷ Judges Klonowiecka-Milart and Jayasinghe disagreed with the majority's 'mechanistic application of the ICTY and ICTR approach', given the 'obvious differences regarding the position held by the ECCC, as compared with the *ad hoc* criminal tribunals, [vis-à-vis] the national systems that occasioned the violations'.⁸⁸ They reasoned as follows:

While the responsibility of an international court for domestic conduct may be limited to explicit 'concerted action', a different analysis is required of an 'internationalized' court, which is an emanation of the state that called it into being. We propose that it is a larger principle of shared responsibility that controls the question whether a hybrid court ought to be accountable for the acts of the domestic system. The extent of a tribunal's 'shared responsibility' must be determined as a matter of fairness, taking into account the entirety of the circumstances.⁸⁹

The judges concluded that the requirement of a link between the sentencing court and the violation should not be applied in the context of the ECCC and that the accused was entitled to a remedy for the infringement of his right to liberty, including recognition of the violation and reduction of sentence.⁹⁰

It has already been noted that judges have tended not to expressly dispute or disagree with the reasoning of other courts and tribunals, but to refer instead to differences in the facts being considered or the institutions rendering the decisions. One exception to this can be found in the case law of the SCSL. In the *Taylor* case, the Appeals Chamber rejected the holding of the Trial Chamber that aiding and abetting generally warrants a lesser sentence than other forms of participation.⁹¹ In its decision, the Chamber considered the case law of the *ad hoc* Tribunals that had been cited by the defence and adopted by the Trial Chamber, principally the holding of the ICTY Appeals Chamber in the *Vasiljević* case. The Appeals Chamber expressly stated that it '[did] not consider that holding persuasive', finding that '[a] number of the national laws relied on in the *Vasiljević* Appeal Judgment do not support the principle that aiding and abetting *as a form of criminal participation* warrants a lesser punishment, but only establish that an accused's minor participation in the commission of the crime may be a mitigating circumstance'.⁹² The Chamber also highlighted other case law to the same effect.

The decisions cited above demonstrate that judges have been willing to depart from the case law of other courts and tribunals where justified by the facts of the particular case or the nature of the institution issuing the decision, or on the basis that they disagree with the reasoning it contains. It is clear, therefore, that the practice of judicial cross-referencing will not always lead to consistency in the decisions of different

⁸⁷ *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012) Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe para 4.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, para 7.

⁹⁰ *Ibid.*, para 20.

⁹¹ *Taylor* SCSL-03-01-A (Judgment, 26 September 2013) para 666.

⁹² *Ibid.*, para 667 (emphasis in the original).

judicial institutions. Nonetheless, the process of distinguishing cases and explaining departures from the decisions of other courts and tribunals can be considered beneficial for reasons that will be discussed further below.

3.5 Summary

Analysis of the sentencing decisions of the SCSL, the ECCC and the ICC reveals a significant level of judicial cross-referencing. While judges have tended to refer to other international(ized) criminal tribunals most frequently, they have turned to the decisions of other courts and tribunals on a number of occasions. In most instances, the decisions of other courts and tribunals have been used to support the reasoning of the Chambers. However, judges have demonstrated a willingness to depart from external jurisprudence in response to the facts of the case, the nature of their institution or a disagreement with the reasoning of another court or tribunal. The remainder of this chapter will consider the implications of the trends that have been observed in the case law.

4. THE IMPLICATIONS OF JUDICIAL CROSS-REFERENCING IN INTERNATIONAL SENTENCING DECISIONS

The tendency of judges to refer to and use the decisions of other courts and tribunals in the course of their sentencing decisions has a number of potential implications, many of which are highly desirable. The various implications of the practice will be examined in turn in the sections below.

4.1 The Development of a Coherent Sentencing Regime

The practice of judicial cross-referencing in sentencing decisions can be considered highly beneficial insofar as it helps to support the development of a coherent body of law regulating sentencing for international crimes. The importance of a coherent sentencing regime must be considered in light of concerns about the implications of the proliferation of international courts and tribunals for the coherence of international law more generally.⁹³ A number of international(ized) courts and tribunals have now been created with the authority to impose sentences on individuals found guilty of the commission of international crimes. In the absence of any formal hierarchy between these international institutions, or concrete obligation for judges in one tribunal to

⁹³ This issue was raised by Judge Guillaume, as President of the International Court of Justice, at the Sixth Committee of the General Assembly of the UN, 27 October 2000. The issue has since been considered by the International Law Commission. See International Law Commission (finalized by M. Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (A/CN.4/L.682, 13 April 2006). For academic debate, see symposium in (1999) 31 *New York University Journal of International Law and Politics*; M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *LJIL* 553. G. Hafner, 'Pros and Cons Ensuing from Fragmentation in International Law' (2004) 25 *Michigan Journal of International Law* 849.

follow the decisions of another, there is a risk that inconsistencies may arise in the case law of different courts and tribunals.

As in any field of international law, coherence is important insofar as it promotes the certainty and clarity of the law and, in doing so, promotes fairness and the equal treatment of its subjects.⁹⁴ The relationship between the consistency of punishment, on the one hand, and fairness and equal treatment, has been recognized by the judges of international(ized) criminal courts and tribunals in the course of their sentencing decisions.⁹⁵ In the context of international sentencing, the coherence of the law has also been understood to support the perceived legitimacy of international criminal justice as well as its ability to deter future crimes by outlining a clear standard of punishment.⁹⁶

By referring to the decisions of other courts and tribunals in the course of their decision-making, in the manner discussed above, judges have helped to support the development of a coherent body of law on sentencing issues, both in terms of the principles and factors taken into account in the determination of sentence and the length of the sentence that is ultimately imposed on the accused. The content analysis referred to above reveals a tendency for judges to refer not only to other criminal justice institutions, but also judicial institutions which are primarily concerned with the responsibility of States, such as regional human rights courts and the ICJ. This is significant insofar as it helps to promote coherence in the interpretation and application of norms beyond the specific field of international criminal law.

Of course, reference to the practice of other courts and tribunals may not necessarily result in the adoption of a consistent approach to similar issues. The sentencing decisions of the SCSL, the ECCC and the ICC have indicated that judges may depart from external jurisprudence for a number of different reasons, including disagreement with the reasoning of the judges as well as variations in the nature and function of different judicial institutions and the particular facts and circumstances of the cases that they have addressed. Differences in the legal frameworks of judicial institutions may also prevent the development of a coherent jurisprudence on certain issues. Even where judges depart from the decisions of other courts and tribunals, the practice of referring to external jurisprudence can be considered beneficial in that it allows judges to ensure that deviations from previous decisions are not arbitrary, but based on clear reasoning.

4.2 The Quality of Decisions that Judges Produce

Even if judicial cross-referencing does not result in a consistent body of jurisprudence on sentencing issues, the practice has value insofar as it introduces new ideas into the judicial decision-making process and, in doing so, contributes to the depth of reasoning, and thus the quality, of the decisions that judges produce. At the domestic

⁹⁴ D'Ascoli (n 1) 199. K. Ambos, *Treaties on International Criminal Law. Volume II: The Crimes and Sentencing* (Oxford University Press 2014) 269–70.

⁹⁵ *Delalic et al* IT-96-21-A (Judgment, 20 February 2001) para 756; 'One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice', cited in *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012) para 374.

⁹⁶ D'Ascoli (n 1) 199.

level, comparative reasoning has been understood to have a valuable function by 'expand[ing] the interpreter's horizons',⁹⁷ and by encouraging judges to approach problems 'more creatively or with greater insight'.⁹⁸ While the proliferation of international courts and tribunals has increased the risk that different institutions may interpret and apply the law in an inconsistent manner, it has also opened up new opportunities for comparative reasoning at the international level.

The incorporation of new ideas into the judicial decision-making process may enhance the quality of judicial decisions in different ways, beyond promoting coherence in the interpretation and application of the law by a variety of judicial institutions. First, judicial cross-referencing may increase the quality of judicial decisions by leading judges to adopt new and qualitatively 'better' approaches to the legal issues they have been called upon to address; approaches which have been developed, and perhaps even tried and tested, elsewhere. Secondly, even if judges do not follow the decisions of other courts and tribunals, the process of referring to, considering and rejecting approaches taken by other institutions may increase the quality of sentencing decisions by prompting greater depth of reasoning and encouraging judges to give stronger justifications for the approaches that they adopt.⁹⁹ This process could be considered just as valuable, if not more so, than the development of a coherent jurisprudence, which may be the consequence of the interaction.

4.3 The Weight and Authority of Sentencing Decisions

Another beneficial implication of the practice of judicial cross-referencing is that it could serve to increase the weight or authority of sentencing decisions by showing that the reasoning that the decisions contain is in line with existing case law, including, perhaps, that of more established judicial institutions. The tendency of judges to cite the decisions of other courts and tribunals and emphasize the consistency of their reasoning with that of other courts and tribunals may be driven, at least in part, by the desire of judges to strengthen the decisions that they produce.

The potential for reference to external jurisprudence to increase the weight or authority of sentencing decisions is, however, dependent on the way in which external jurisprudence is used. Misinterpretation of external jurisprudence could call into question the reasoning of a particular judge or chamber. In the decisions surveyed above, there have been instances where misinterpretation of external jurisprudence by the Trial Chamber, or the parties to the proceedings has been highlighted on appeal.¹⁰⁰ Reference to external jurisprudence might also be called into question where it leads judges to depart from their own legal frameworks or transplant rules and principles into

⁹⁷ A. Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 170.

⁹⁸ A-M. Slaughter, *A New World Order* (Princeton University Press 2004) 77.

⁹⁹ See discussion in W.T. Worster, 'Competition and Comity in the Fragmentation of International Law' (2008–2009) 34 *Brooklyn Journal of International Law* 119.

¹⁰⁰ *Duch* 001/18-07-2007/ECCC/SC (Judgment, 3 February 2012) para 395. The Supreme Court Chamber found that the Trial Chamber had 'committed an error of law in granting a remedy based on "the case law of the ICTR Appeals Chamber" which, upon deeper analysis, was misinterpreted by the Trial Chamber'. See also *Sesay, Kallon and Gbao* SCSL-04-15-A (Judgment, 26 October 2009) paras 1248–1249.

a context to which they are not suited. Provided that judges take care to avoid these risks, reference to external jurisprudence could be a useful tool for judges to strengthen their own decisions. It may be particularly useful for judges working in relatively new institutions which have not yet produced a large body of jurisprudence on sentencing issues.

4.4 The Efficiency of the Criminal Justice Process

The practice of judicial cross-referencing could also have consequences for the efficiency of the criminal justice process. While the efficiency of judicial proceedings is a key consideration in many areas of law, it is particularly important in the field of international criminal law because of the disparity that currently exists between the number of complex serious international crimes cases requiring adjudication and the capacity of judicial institutions to address them.

In some instances, the practice of judicial cross-referencing may serve to increase the efficiency of the judicial decision-making process by offering judges a starting point in their deliberations, or even a ready-made solution to the issues that they are called upon to address. Adopting principles and rules that have been developed elsewhere may simply be quicker and easier for judges than starting from scratch. However, any efficiency gain that is associated with the practice of judicial cross-referencing is likely to be lost if judges exercise due caution in their use of external jurisprudence. In order to avoid misinterpretation, judges must consider the decisions of other courts and tribunals with great care. They must also consider whether or not a transplant of rules and principles from one institution to another is appropriate, bearing in mind the context in which they are to operate. Thorough review of the decisions of a wide range of judicial institutions may, in practice, be a time-consuming, rather than a time-saving, process. Where this is the case, the benefits of judicial cross-referencing must be weighed against its negative implications for the efficiency of the criminal justice process. Arguably, any detrimental impact that the review of external jurisprudence may have for the efficiency of the criminal justice process is outweighed by the benefits of the practice that have been outlined above.

4.5 Indeterminacy

The greatest concern raised by the practice of judicial cross-referencing is its potential to introduce a degree of indeterminacy into international sentencing decisions. Concerns about the indeterminacy of sentencing decisions may arise if judges fail to provide a clear methodology for their reference to external jurisprudence and if they are seen to refer to external case law in an *ad hoc* or arbitrary manner. This is particularly likely in circumstances where judges draw directly from external case law to solve a legal issue without reference to the sources of law that they are bound to apply.¹⁰¹

¹⁰¹ A. Cassese, 'The Influence of European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks', in M. Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Martinus Nijhoff Publishers 2003) 21.

Writing in relation to the use of regional human rights jurisprudence at the *ad hoc* Tribunals, Former President of the ICTY, Antonio Cassese, has advised against such a 'wild' approach to external jurisprudence, which, he argued, lacks both legal rigour and fairness to the accused.¹⁰² Concern that a 'wild' approach to external case law may lead to lack of foreseeability and fairness have also been raised in the specific field of international detention.¹⁰³

The sentencing decisions included in this study suggest that judicial cross-referencing may indeed be a source of indeterminacy in international sentencing decisions. In the decisions referred to above, judges have not tended to explain their rationale for referring to external jurisprudence, or, in most instances, their legal basis for doing so. Even where judges have expressly drawn from the decisions of other courts and tribunals, they have not explained their approach by reference to their sources of applicable law. They have not, for example, argued that the decisions that they have drawn from reflect the current state of customary international law or identify a general principle of law to be applied in the present case. The result is a sense of arbitrariness and lack of clarity as to why external case law has been cited and how it has been used. Such practice is particularly problematic in situations where judges have drawn from the decisions of regional human rights courts or domestic legal systems that have no apparent link with the accused or the crimes that have been committed.

The risk that judicial cross-referencing will increase the indeterminacy of international sentencing decisions can easily be avoided if judges provide a clear methodology for their reference to external jurisprudence and ensure that any citations that are made are explained by relevant sources of applicable law and interpretation. If judges take this approach, they can ensure that the benefits of judicial cross-referencing are realized whilst ensuring that the practice does not have a negative impact on the certainty and fairness of the sentencing process.

4.6 Summary

In sum, the practice of judicial cross-referencing can be considered largely beneficial. Provided that judges exercise due caution in their reference to external jurisprudence, the practice could boost the weight and authority of the decisions that judges produce, increase their overall quality and contribute to the coherence of international law, both within and beyond the field of international criminal law.

5. CONCLUSION

Content analysis of the sentencing decisions of the SCSL, the ECCC and the ICC has confirmed that the practice of judicial cross-referencing, which has been observed in other areas of international law, is also seen in the sentencing decisions of international(ized) criminal justice institutions. In the decisions included in this study, judges have

¹⁰² Ibid.

¹⁰³ D. Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals* (TMC Asser Press 2012) 160.

referred to a range of other courts and tribunals in relation to a number of different legal issues. The sentencing decisions of the three institutions suggest that while judges have not considered themselves bound by the case law of other judicial institutions, they have, at times, drawn heavily from it.

The tendency of judges to refer to and use the decisions of other courts and tribunals in the course of their decision-making can be viewed in a positive light. While detailed review of external case law may have negative implications for the efficiency of the criminal justice process, this disadvantage is outweighed by a number of benefits associated with the practice: benefits for the weight and authority of sentencing decisions, the quality of reasoning that they contain and the coherence of international law. The greatest concern raised by the practice of judicial cross-referencing in the decisions included in this study is that the practice will introduce indeterminacy into the field of international sentencing. Judges can avoid this risk by providing a clear methodology for their reference to external jurisprudence and by situating each reference in their sources of applicable law and interpretation. If judges take this approach, they can realize the benefits of judicial cross-referencing while ensuring that the practice does not undermine the clarity and fairness of the sentencing process.

It is important to note that many of the benefits associated with judicial cross-referencing that have been referred to in this chapter are not confined to the early years of the operation of a criminal justice institution. While judicial cross-referencing may be particularly useful for young institutions which have not developed their own body of jurisprudence on sentencing issues, the benefits of judicial cross-referencing for the coherence of international law and the quality of the decisions that judges produce will continue throughout the lifespan of each individual court or tribunal. Consequently, it is hoped that the practice that has been observed in this study will continue in the practice of the ECCC and the ICC, which remain in operation.

The sentencing decisions included in this study reveal that while judges have referred to a number of other judicial institutions in the course of their sentencing decisions, the case law of the *ad hoc* Tribunals has been referred to more frequently than that of any other judicial institution. As the work of the two *ad hoc* Tribunals comes to a close, it is probable that the ICC will become a more prominent voice in the dialogue between judicial institutions on sentencing issues. The ICC is in a powerful position to influence the development of international criminal law in future years, both within and beyond the field of international sentencing, due to its permanence and wide-ranging jurisdiction. With this in mind, it is important that the judges of the ICC continue to build upon the body of jurisprudence that has already been established by the two *ad hoc* Tribunals and strive for clarity and consistency in their own decisions. In doing so, they could play an important role in encouraging the development of a coherent body of jurisprudence on sentencing issues and realising the benefits that this might entail.